



Public Service Commission

State of North Dakota

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24 July 2013

Mr. Kyle Wanner, Airport Planner
North Dakota Aeronautics Commission
kcwanner@nd.gov

sent via electronic mail only

Re: Case No. PU-13-64, Courtenay Wind Farm Siting Application

Dear Mr. Wanner:

Thank you for your comments received July 24, 2013 concerning the captioned case. The hearing on this case was held July 12, 2013, and the record is closed to new evidence. Without further action, then, and except for late-filed exhibits specified during the hearing, the record on which the Commission can base its decision is closed.

Under North Dakota law, the Commission may consider evidence acquired after the hearing and resulting record are closed, if certain requirements are met and certain procedures are followed. These can be found in North Dakota Century Code Section 28-32-25, and include a determination that the offered evidence is competent and relevant, and if the other parties (in this case the applicant) is provided the information and has an opportunity to respond and cross-examine regarding the same. A copy of N.D.C.C. section 28-32-25 is attached.

Any Commission decision to consider after acquired evidence would be made at a Commission Meeting, and the required notice and opportunity afforded the applicant to respond or cross examine regarding the additional evidence would follow that meeting.

I understand from our phone conversation that you would like to ask the Commission to consider evidence or information not submitted at the hearing, I will consider your July 24th letter as your written request specifying the information or evidence you want it to consider. We will send a copy of your request to the attorney for the applicant, Mollie Smith, Fredrikson & Byron P.A., 200 South Sixth Street, Suite 4000, Minneapolis, MN 55402-1425
msmith@fredlaw.com.

If you have questions, please let me know.

Sincerely,

Jerry Lein,
Staff Engineer
701 328-1035

c. Mollie Smith

rules may establish procedures for converting an administrative matter from one type of proceeding to another type of proceeding.

28-32-23. Adjudicative proceedings - Exceptions - Rules of procedure.

Notwithstanding the requirements for standardization of procedures in adjudicative proceedings under this chapter, an administrative agency may adopt specific agency rules of procedure not inconsistent with this chapter. An administrative agency may also adopt specific agency rules of procedure when necessary to comply with requirements found elsewhere in this code or when necessary to comply with the requirements of federal statutes, rules, or standards.

28-32-24. Evidence to be considered by agency - Official notice.

1. The admissibility of evidence in any adjudicative proceeding before an administrative agency shall be determined in accordance with the North Dakota Rules of Evidence. An administrative agency, or any person conducting proceedings for it, may waive application of the North Dakota Rules of Evidence if a waiver is necessary to ascertain the substantial rights of a party to the proceeding, but only relevant evidence shall be admitted. The waiver must be specifically stated, orally or in writing, either prior to or at a hearing or other proceeding.
2. All objections offered to evidence shall be noted in the record of the proceeding. No information or evidence except that which has been offered, admitted, and made a part of the official record of the proceeding shall be considered by the administrative agency, except as otherwise provided in this chapter.
3. Upon proper objection, evidence that is irrelevant, immaterial, unduly repetitious, or excludable on constitutional or statutory grounds, or on the basis of evidentiary privilege recognized in the courts of this state, may be excluded. In the absence of proper objection, the agency, or any person conducting a proceeding for it, may exclude objectionable evidence.
4. The North Dakota Rules of Evidence in regard to privileges apply at all stages of an administrative proceeding under this chapter.
5. All testimony must be made under oath or affirmation. Relevant statements presented by nonparties may be received as evidence if all parties are given an opportunity to cross-examine the nonparty witness or to otherwise challenge or rebut the statements. Nonparties may not examine or cross-examine witnesses except pursuant to a grant of intervention.
6. Evidence may be received in written form if doing so will expedite the proceeding without substantial prejudice to the interests of any party.
7. Official notice may be taken of any facts that could be judicially noticed in the courts of this state. Additionally, official notice may be taken of any facts as authorized in agency rules.

28-32-25. Adjudicative proceedings - Consideration of information not presented at a hearing.

In any adjudicative proceeding, an administrative agency may avail itself of competent and relevant information or evidence in its possession or furnished by members of its staff, or secured from any person in the course of an independent investigation conducted by the agency, in addition to the evidence presented at the hearing. It may do so after first transmitting a copy of the information or evidence or an abstract thereof to each party of record in the proceeding. The agency must afford each party, upon written request, an opportunity to examine the information or evidence and to present its own information or evidence and to cross-examine the person furnishing the information or evidence. Any further testimony that is necessary shall be taken at a hearing to be called and held, giving at least ten days' notice. Notice must be served upon the parties in the manner allowed for service under the North Dakota Rules of Civil Procedure. This section also applies to information officially noticed after

the hearing when the issuance of any initial or final order is based in whole or in part on the facts or material noticed.

28-32-26. Costs of investigation.

An agency may assess the costs of an investigation to a person found to be in violation of a statute or rule as a result of an adjudicative proceeding or informal disposition. The total costs assessed and any civil penalty that may be imposed as a result of violation may not exceed the statutorily authorized civil penalty for the violation. For the purposes of this section, costs mean reasonable out-of-pocket agency costs, not including any attorney's fees, actually incurred in conducting the investigation for which they may be assessed. Any such costs paid must be paid into the general fund and are appropriated as a refund to the agency for the purposes of defraying the costs of undertaking the investigation.

28-32-27. Hearing officer - Disqualification - Substitution.

1. Any person or persons presiding for the agency in an administrative proceeding must be referred to individually or collectively as hearing officer. Any person from the office of administrative hearings presiding for the agency as a hearing officer in an administrative proceeding must be referred to as an administrative law judge.
2. Any hearing officer is subject to disqualification for good cause shown.
3. Any party may petition for the disqualification of any person presiding as a hearing officer upon discovering facts establishing grounds for disqualification.
4. A person whose disqualification is requested shall determine whether to grant the petition, stating facts and reasons for the determination.
5. If a substitute is required for a person who is disqualified or becomes unavailable for any other reason, the substitute may be appointed by:
 - a. The attorney general, if the disqualified or unavailable person is an assistant attorney general;
 - b. The agency head, if the disqualified or unavailable person is one or more members of the agency head or one or more other persons designated by the agency head;
 - c. A supervising hearing officer, if the disqualified or unavailable person is a hearing officer designated from an office, pool, panel, or division of hearing officers; or
 - d. The governor, in all other cases.
6. Any action taken by a duly appointed substitute for a disqualified or unavailable person is as effective as if taken by the disqualified or unavailable person.
7. Any hearing officer in an administrative proceeding, from the time of appointment or designation, may exercise any authority granted by law or rule. A hearing officer may be designated to preside over the entire administrative proceeding and may issue orders accordingly. A procedural hearing officer may only issue orders in regard to the course and conduct of the hearing under statute or rule and to otherwise effect an orderly hearing. If a procedural hearing officer is designated, the agency head must be present at the hearing and the agency head shall issue findings of fact and conclusions of law, as well as any order resulting from the hearing.

28-32-28. Intervention.

An administrative agency may grant intervention in an adjudicative proceeding to promote the interests of justice if intervention will not impair the orderly and prompt conduct of the proceeding and if the petitioning intervenor demonstrates that the petitioner's legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of statute or rule. The agency may impose conditions and limitations upon intervention. The agency shall give reasonable notice of the intervention to all parties. An administrative agency may adopt rules relating to intervention in an adjudicative proceeding.